

STATE OF MICHIGAN  
IN THE SUPREME COURT

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Appeal from the Michigan Court of Appeals  
The Honorable Janet Neff, Michael Smolenski, and Brian Zahra, Presiding

VIRGINIA JOLIET,  
Plaintiff-Appellee.

UNPUBLISHED  
August 31, 2004

Open

v  
GREGORY E. PITONIAK and FRANK BACHA,  
Defendants-Appellants,

No. 247590  
Wayne Circuit Court  
LC No. 01-140733-CZ

247590

140733 CZ

L. Summary

and  
JAMES ARANGO,  
Defendant.

E. PHILIP ADAMASZEK (P10030)  
Attorney for Plaintiff-Appellee  
66 Market Street  
Mt. Clemens, MI 48043  
(586) 465-8018

JANET CALLAHAN BARNES (P 29887)  
Attorney for Defendants-Appellants  
30903 Northwestern Highway  
P.O. Box 3040  
Farmington Hills, MI 48333-3040  
(248) 851-9500

127175

Att

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DEFENDANTS-APPELLANTS' NOTICE OF APPEARANCE

APPEARANCE

NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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MICHIGAN SUPREME COURT

SECRET WARDLE

STATE OF MICHIGAN  
IN THE SUPREME COURT

\* \* \* \* \*

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The Honorable Janet Neff, Michael Smolenski, and Brian Zahra, Presiding

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VIRGINIA M. JOLIET,  
Plaintiff-Appellee,

-vs-

GREGORY E. PITONIAK,  
Individually and as Mayor of  
the City of Taylor, and  
FRANK BACHA,

Defendants-Appellants.

Supreme Court No. \_\_\_\_\_

Court of Appeals No. 247590

Lower Court No. 01 140733 CZ

SECRET WARDLE

E. PHILIP ADAMASAZEK (P10030)  
Attorney for Plaintiff-Appellee  
66 Market Street  
Mt. Clemens, MI 48043  
(586) 465-8018

JANET CALLAHAN BARNES (P 29887)  
Attorney for Defendants-Appellants  
30903 Northwestern Highway  
P.O. Box 3040  
Farmington Hills, MI 48333-3040  
(248) 851-9500

**DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL**

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SECRET WARDLE

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MCR 2.116(C)(7)

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**MISCELLANEOUS**

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**STATEMENT IDENTIFYING JUDGMENT APPEALED FROM  
AND INDICATING RELIEF SOUGHT**

Defendants-Appellants are Gregory Pitoniak, who is the Mayor of the City of Taylor, and Frank Bacha, who went on leave from his employment with the City in September of 1998 and resigned effective October 8, 1998. Plaintiff-Appellee Virginia Joliet also worked for the City. According to her sworn deposition testimony, the last day that she actually worked for the city was November 23, 1998. She was on vacation from that date until November 30, 1998. Plaintiff voluntarily retired on November 30, 1998, effective December 1, 1998, because she allegedly could no longer tolerate alleged acts of age and gender discrimination and sexual harassment. According to Plaintiff's sworn deposition testimony, there were no acts of sexual harassment by Bacha after he went on leave in September of 1998 and there were no acts of discrimination by any City official after November 23, 1998. Plaintiff's counsel admitted during questioning in the Court of Appeals that no act of harassment or discrimination occurred while Plaintiff was on vacation in November of 1998.

Defendants seek leave to appeal from the Michigan Court of Appeals' August 31, 2004 opinion, which affirmed Wayne County Circuit Court Judge Louis Simmons' order denying Defendants' Motion for Summary Disposition on Plaintiff's constructive discharge/age and gender discrimination and sexual harassment action. Defendants' motion asserted that Plaintiff's claims were barred by the statute of limitations because Plaintiff's action was filed more than three years after her cause of action accrued.

The Court of Appeals' opinion is attached as Exhibit A. Judge Simmons' March 11, 2003 order denying Defendants' Motion for Summary Disposition is attached as Exhibit B.

Judges Neff and Smolenski's opinion in this case applied *Jacobson v Parda Federal Credit Union*, 457 Mich 318; 577 NW2d 881 (1998), to conclude that Plaintiff's cause of action accrued on the date that Plaintiff unilaterally chose to resign from her employment with the City of Taylor rather than on the date of the last alleged act of sexual harassment or employment discrimination. (Exhibit A, Per Curiam, pp 2-3.)

*Jacobson, supra*, was a 4-3 opinion issued by this Court in 1998. Justice Michael Cavanagh authored the majority opinion in which Justice Kelly and then Justices Mallett and Boyle concurred. Justice Clifford Taylor wrote the dissenting opinion, in which Justice Weaver and the late Justice Brickley concurred.

In this case, Judge Zahra issued a concurring opinion in which he stated:

I concur in the result reached by [sic] because I am bound to do so by *Jacobson v Parda Federal Credit Union*, 457 Mich 318, 321; 577 NW2d 881 (1998). [footnote omitted.] I write separately to express my agreement with Justice Taylor's dissent in *Jacobson*. 457 Mich at 330. **But for the majority opinion in *Jacobson, supra*, I would hold that it is the employer's adverse action, not the date an employee unilaterally chooses to resign, that triggers the limitation period in an employment case involving a constructive discharge.**

The statute of limitation at issue MCL 600.580[5], states in relevant part:

(1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

\* \* \*

(9) The period of limitation is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property. [By amendment, this statute is now cited as MCL 600.5805(10).]

In *Jacobson*, however, our Supreme Court held that a claim of employment discrimination, in the context of a 'constructive discharge,' generally accrues at the moment of resignation. *Jacobson, supra* at 321. The *Jacobson* Court expressed concern that an employee, by controlling the date of resignation,

controls the date her cause of action accrues. *Id.* at 328-329 n 22. And while the majority in *Jacobson* recognized the potential for abuse when plaintiffs control the accrual of a cause of action, it concluded that the abuse would be mitigated in practice: ‘[o]bviously a person claiming ‘intolerable’ working conditions for some number of years will be hard pressed to convince a trier of fact, or even raise a question of fact, that such conditions were unreasonably ‘intolerable.’” *Id.* at 330 n 24.<sup>3</sup>

However, it is legally irrelevant that ‘[t]he hypothetical tardy plaintiff . . . is more likely to harm, rather than help, her cause by delaying action.’ *Jacobson, supra*. Statutes of limitation define the time frame in which a plaintiff can file suit, not whether a plaintiff would be hard pressed to prove the claim. ‘A rule that allows plaintiffs to determine when a statute of limitations begins to run, e.g. by deciding when to resign, undermines the primary purposes of statutes of limitation.’ *Jacobson, supra* at 339 (Taylor, J., dissenting). I agree with Justice Taylor that ‘it is the adverse employment action leading to an employee’s decision to leave that constitutes the ‘discharge’ giving rise to the cause of action.’ *Jacobson, supra* at 335 (Taylor, J., dissenting). ‘Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination.’ *Id.* (Taylor, J., dissenting), citing *Delaware State College v Ricks*, 449 US 250, 257; 101 S Ct 498; 66 L Ed 2d 431 (1980).

Although I agree with the dissenting opinion in *Jacobson*, I am duty bound to follow the rule of law established by the majority opinion *Jacobson*. I therefore concur in the result reached by the majority opinion in this case.

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<sup>3</sup> Simply put, *Jacobson* permits a plaintiff to postpone bringing a cause of action long after any discriminatory act occurred. Applied to the facts of this case, plaintiff effectively ‘controlled’ the accrual of her cause of action by resigning after taking a brief vacation, during which no event occurred that supports a ‘constructive discharge.’ (Emphasis added.) (Exhibit A, Zahra, J., concurring, pp 1-2.)

The per curiam opinion in this case, Exhibit A, p 2, also relied on this Court’s opinion in *Collins v Comerica Bank*, 468 Mich 628, 632; 664 NW2d 713 (2003), which, as Judge Zahra pointed out in footnote 1 of his concurring opinion, was misplaced reliance because *Collins* did not involve a constructive discharge and did not address the issue of when the cause of action accrued. As Judge Zahra explained:

*Collins* did not involve a ‘constructive discharge.’ ‘Constructive discharge’ is a defense against the employer’s argument that the employee is precluded from bringing suit because he voluntarily terminated his employment. *Jacobson, supra* at 321 n 9, citing *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994). In *Collins*, the employer fired the plaintiff. Here, plaintiff resigned. *Collins* did not interpret when plaintiff’s claim ‘accrued’ in the context of the defense of ‘constructive discharge,’ and therefore is not applicable to the instant case. (Exhibit A, Zhara, J., concurring, p 1, n 1.)

This Supreme Court found that the statute of limitations issue presented in *Jacobson* merited the Court granting leave to appeal. As explained, that appeal resulted in a 4-3 opinion from the Court. With due respect for the Justices who wrote or concurred in the majority opinion in *Jacobson*, as Judge Zahra’s concurring opinion explains, Justice Taylor’s dissenting opinion in *Jacobson* is the better-reasoned opinion and should be adopted to control this case.

Moreover, application of *Jacobson* (or *Collins*) is clearly not appropriate with respect to Plaintiff’s claims against Frank Bacha because he left his employment with the City, and had no further contact with the Plaintiff, approximately two months before Plaintiff retired and more than three years and two months before Plaintiff filed her action against him.

Therefore, Defendants ask this Court to grant their Application for Leave to Appeal to adopt Justice Taylor’s dissenting opinion in *Jacobson* and to apply that opinion to this case to find that the lower courts erred by concluding that Plaintiff’s action is not time barred. Alternatively, this Court should issue a peremptory per curiam opinion adopting and applying Justice Taylor’s dissent in *Jacobson* to reverse the order denying summary disposition to Defendants Mayor Gregory Pitoniak and Frank Bacha.

## STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

- I. Should this Court grant leave to appeal, or peremptory relief, to adopt Justice Taylor's dissenting opinion in *Jacobson v Parda Federal Credit Union* as controlling authority in this case and to conclude that the lower courts erred by finding that Plaintiff's constructive discharge action is not barred by the relevant statute of limitation?**

The Trial Court found that it did not err.

The majority of the Court of Appeals applied *Jacobson, supra* to affirm the Trial Court.

Judge Zahra would have applied Justice Taylor's dissenting opinion in *Jacobson* in this case if he had been permitted to do so.

Defendants-Appellants answer "yes."

Plaintiff-Appellee may contend that the answer is "no."

- II. Should this Court should grant leave to appeal, or peremptory relief, to conclude that the continuing violations theory did not toll the period of limitations.**

The Trial Court found that it did not err.

The Court of Appeals did not address this issue.

Defendants-Appellants answer "yes."

Plaintiff-Appellee may contend that the answer is "no."

- III. Does Plaintiff's alleged breach of contract claim under Count IV of her Complaint extend the statute of limitations where Plaintiff seeks damages for injury to "person or property."**

The Trial Court did not address this issue.

The Court of Appeals did not address this issue.

Defendants-Appellants answer "no."

Plaintiff-Appellee may contend that the answer is "yes."

## STATEMENT OF FACTS

### Nature of Action.

Plaintiff-Appellee Virginia Joliet's Complaint alleges that while she was an employee of the City of Taylor, she was subject to age and sex discrimination in violation of the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.* Specifically, Plaintiff claimed sex discrimination (*quid pro quo*), sexual discrimination (hostile environment), age discrimination, and breach of contract and misrepresentation. (Exhibit C, Complaint.) But regardless of how Plaintiff characterized her theories of liability, she is seeking damages for alleged personal injury.

### Factual Background.

Virginia Joliet began her employment with the City of Taylor in 1990 as an administrative assistant. (Ex. D, Plaintiff's 8/21/02 Deposition, pp 6, 16.) Approximately two years later, Plaintiff was promoted to the position of computer specialist. (*Id.* at 17.) Then, in 1995, Plaintiff was promoted to manager of data processing, which is the last position that she held with the City before voluntarily retiring. (*Id.* at 19-20, 23.) Plaintiff considered Mayor Pitoniak her immediate supervisor. (*Id.* at 28.)

The City hired Randy Wittner as the Director of Information Systems on August 31, 1998. (*Id.* at 61.) Plaintiff testified that Wittner was instructed to watch her for mistakes. (*Id.* at 62.) Plaintiff alleges that when Wittner was hired, her job duties were restricted. (*Id.* at 23.) Plaintiff testified that by October 19, 1998, Wittner was doing her job duties and all her job duties had been taken away leaving her with "a job where I go in and count the number of holes in the ceiling." (Exhibit E, Plaintiff's 9/3/02 Deposition, p 89.) Plaintiff testified that as of that

date, "nobody knew what I was supposed to do, because everything had been taken away from me. They may as well have put me in a closet." (*Id.*)

Frank Bacha, who became the director of the Department of Public Works during Plaintiff's tenure with the City, was a member of a newly-formed computer committee. (Exhibit D, pp 29, 30.)

Beginning at least as early as August, 1997, Plaintiff kept notes, in her daily planner, which she later entered into a computer file, regarding alleged discriminatory acts by Bacha. (*Id.* at 32, 33, 36-39, 41, 43; Exhibit E, p 118.) Throughout the remainder of her employment with the City, Plaintiff continued to document actions that she believed were discriminatory in some manner. The incidents that Plaintiff recorded occurred from August, 1997 to September, 1998.

Plaintiff filed written complaints regarding harassment, particularly by Frank Bacha, on two separate occasions: February 12, 1998 and September 3, 1998. (Exhibit D, p 118; Exhibit F, Plaintiff's September 3, 1998 Memo.) In addition, at the end of September, 1998, upon the initiative of the City, Plaintiff met with attorneys from the law firm of Howard and Howard regarding the alleged harassment by Bacha. (Exhibit D, p 64.)

Bacha, whom Plaintiff alleges engaged in the discriminatory acts, last worked for the City in September of 1998, when he went on leave, and he formally resigned his position with the City on October 8, 1998. (Exhibit D, pp 56, 60; Exhibit E, pp 76-77.)

Plaintiff admitted that Bacha did not engage in any sexual or age discriminatory acts after he went on leave in September of 1998:

Q: Okay. And by the same token, then, after September of '98, Frank Bacha did not personally engage in any type of sexual or age discrimination against you?

A: No. He had gotten the ball rolling well in advance of that. (Exhibit E, p 77.)

Q: Was there any type of harassment by Mr. Bacha that you're aware of after he went on leave in September of 1998?

A: No, I never saw him again. (Exhibit D, p 61.)

With respect to Mayor Pitoniak and any other City officials, Plaintiff testified that they did not engage in any discriminatory behavior after November 24, 1998, at the latest:

Q: What I'm asking you then is — What we're trying to do is go through here, and I want to know specific acts that you feel the Mayor discriminated against you in October, November, December of '98. Okay?

A: That were added to the previous acts?

Q: Yes.

A: Because I'm maintaining that the ball was rolling.

Q: I understand.

A: Okay. The only thing that I can say is that the Mayor kept promising and promising and promising to meet with me, and he would not meet with me. (Exhibit E, p 93.)

\* \* \*

Q: Okay. But you wanted your retirement to be effective December 1st, '98?

A: That's right.

Q: So you had never returned to work after, to the best of your knowledge, November 24th of 1998?

A: That's correct. I did not return to work.

Q: Was there any incident of discrimination that occurred between November 24th and the date you resigned on November 30th?

A: I had no contact with City officials, but I maintained that their actions were cumulative.

Q: Okay. I —

A: But no specific — No.

Q: There was no specific incident of discrimination from November 24th till November 30th; is that correct?

A: Let me just make sure I didn't get — don't have a record of a phone call. There was no specific act of discrimination during that time period. (*Id.* at 111, 113.)

Plaintiff testified under oath that the last day that she actually worked was November 23, 1998, but indicated that she may be "off by a day." (*Id.* at 109, 111, 113.) Plaintiff's last day of actual work was November 23, 1998. (*Id.*) She indicated that she worked Monday of that week, which was November 23, 1998, and was off the rest of the week." (*Id.* at 109.)

Plaintiff took her vacation beginning on November 24, 1998, and submitted her letter of resignation on November 30, 1998. Plaintiff testified that she had no contact with City officials from November 24 to November 30, 1998. (*Id.* at 113.) She also testified that there was no discrimination against her after November 24, 1998. Her specific testimony on this point was:

Q: So certainly there wasn't any discrimination against you by Mr. Bacha and the Mayor or anybody else at the City after November 24th of '98?

A. No. I mean I was on vacation. That doesn't change anything at work. (Objections omitted.) (*Id.* at 111.)

Subsequent to her depositions, Plaintiff signed an affidavit stating that while she was on vacation between November 24 and November 30, 1998, she still had a city pager and there was one call from the office during that time. (Exhibit G, Plaintiff's Corrected Affidavit, ¶ 1.) Plaintiff's affidavit does not state that the call was work related. (*Id.*) Plaintiff's affidavit also states that she checked the City's computer systems backup from home each morning between

November 24 and November 30, 1998. (*Id.* at ¶ 6.) Plaintiff's affidavit is contrary to her sworn deposition testimony that she was not working during that period of time and that as of October 19, 1998, all of her job duties had been taken away from her. (Exhibit E, p 89.)

On November 30, 2001, Plaintiff filed her Complaint naming Mayor Gregory Pitoniak, Frank Bacha and James Arango<sup>1</sup> as Defendants. (Exhibit C.) This was more than three years after the last of Frank Bacha's alleged acts of sexual harassment/discrimination against Plaintiff occurred. (Exhibit D, p 61.) In fact, it was approximately three years and two months after he left his employment with the City. It was also more than three years after Plaintiff alleges any act of discrimination by any City official occurred. (Exhibit E, pp 111, 113.)

Defendants filed a Motion for Summary Disposition under MCR 2.116(C)(7), asserting that Plaintiff's entire action, including her breach of contract action, which was a claim for personal injuries,<sup>2</sup> was barred by the statute of limitations that was then set forth in MCL 600.5805(9) and is now set forth in MCL 600.5805(10). Defendants also argued, relying on *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 539; 398 NW2d 368 (1986) and *Rasheed v Chrysler Motors Corp*, 196 Mich App 196, 207; 493 NW2d 104, revs'd on other grds 445 Mich 109; 517 NW2d 19 (1994), that Plaintiff could not avoid the statute of limitations under the continuing violations theory because Plaintiff became aware of the alleged sexual and age discrimination more than three years before filing her action and Plaintiff cannot seek damages for any alleged discriminatory acts that occurred prior to November 24, 1998.

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<sup>1</sup> Defendant Arango was an outside contractor who did work for the City of Taylor's Department of Public Works. He apparently was never served with the Complaint and has not filed an appearance or responsive pleadings in this matter.

<sup>2</sup> See, *Glowacki v Motor Wheel Corp*, 67 Mich App 448, 460; 241 NW2d 240 (1976); *Stringer v Sparrow Hospital*, 62 Mich App 696; 233 NW2d 696 (1975).

Judge Simmons denied Defendants' motion because he concluded that Plaintiff had three years from the last day that she worked, which he interpreted as the day that she retired, to file her action. (See, 2/21/03 Transcript of hearing on Motion for Summary Disposition, a copy of which is attached as Exhibit H, p 23.) Judge Simmons entered the order denying Defendants' motion on March 11, 2003. (Exhibit B.)

Defendants then filed a timely Application for Leave to Appeal in the Michigan Court of Appeals. On May 14, 2003, the Michigan Court of Appeals granted Defendants' Application for Leave to Appeal and stayed proceedings in the Wayne County Circuit Court. (Exhibit I, Order.)

On August 31, 2004, the Michigan Court of Appeals affirmed Judge Simmons. (Exhibit A.) As explained in the Statement of Order Appealed From and Relief Sought, *supra*, Judges Neff and Smolenski applied this Court's opinions in *Collins v Comerica Bank*, *supra*, and *Jacobson v Parda*, *supra*, without reservation. (Exhibit A, Per Curiam, pp 2-3.) However, Judge Zahra found that *Collins* was distinguishable from this case and followed *Jacobson* only because he was duty bound to do so. (Exhibit A, Zahra, J., concurring, pp 1-3.) Judge Zahra believes that Justice Taylor's dissenting opinion in *Jacobson* properly applies Michigan law and would have applied that dissenting opinion if allowed to do so. (*Id.* at 2-3.) The Court of Appeals did not address the issues concerning whether the continuing violations theory applies to extend the statute of limitations and whether Plaintiff's breach of contract theory extends the statute of limitations. (Exhibit A, Per Curiam, p 3.)

Defendants-Appellants Gregory Pitoniak and Frank Bacha now seek leave to appeal, or peremptory relief, from this Court.

## STANDARD OF REVIEW

The question of whether a claim is barred by the statute of limitations is a question of law subject to de novo review. *Jacobson v Parda Federal Credit Union*, 457 Mich at 324, citing *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 216; 561 NW2d 843 (1997) and *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

## ARGUMENTS

- I. **This Court should grant leave to appeal, or peremptory relief, to apply Justice Taylor's reasoning in his dissenting opinion in *Jacobson v Parda Federal Credit Union* as controlling authority in this case and to conclude that the lower courts erred by finding that Plaintiff's action is not barred by the relevant statute of limitation.**

This Court applies the following rules of statutory construction:

Because the Legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis must begin with the wording of the statute itself. *Carr v General Motors Corp*, 425 Mich 313, 317; 389 NW2d 686 (1986). Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence. *Univ of Mich Bd of Regents v Auditor General*, 167 Mich 444, 450; 132 NW 1037 (1911). The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another. *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931). **Where the language of the statute is clear and unambiguous, the Court must follow it.** *City of Lansing v Lansing Twp*, 356 Mich 641, 649; 97 NW2d 804 (1959). (Emphasis added.) *Robinson v City of Detroit*, 462 Mich 369, 459; 613 NW2d 307 (2000). Accord, *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) ("Where the language is unambiguous, 'we presume that the Legislature intended the meaning clearly expressed---no further judicial construction is required or permitted, and the statute must be enforced as written.'")

At issue in this case are the Legislature's pronouncements in MCL 600.5805(1) and MCL 600.5805(9), which state:<sup>3</sup>

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<sup>3</sup> MCL 600.5805 was amended on March 31, 2003 and section (9) is now found in section (10).

- (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section. . . .
- (9) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

Pursuant to the clear and unambiguous language of section 5805(1), a person shall not bring an action to recover for damages for injuries to a person unless the action is commenced within 3 years after it first accrued. (See, Exhibit A, Zahra, J. concurring, p 2.) Pursuant to section 5805(9), the claim accrues at the time of "injury" "for . . . actions to recover damages . . . for injury to a person . . ." Thus, Plaintiff's claims for sexual harassment and discrimination accrued when the alleged adverse employment action, that is, the alleged sexual harassment and discrimination, occurred.

Counts I and II of Plaintiff's Complaint alleged sexual harassment and discrimination by Frank Bacha and that Bacha and Pitoniak used Plaintiff's rejection of such offensive conduct as a factor in decisions affecting her employment. Plaintiff admitted during both her depositions that Defendant Bacha did not engage in any harassment or discrimination against her after he went on leave in September of 1998. (Exhibit D, p 61; Exhibit E, p 77.) She never saw him after he went on leave. (Exhibit D, p 61.) Plaintiff also testified that there were no acts of discrimination by any City officials between November 24, 1998 and November 30, 1998 and that she had no contact with City officials during that time. (Exhibit E, p 93, 111, 113.)

Furthermore, in the Appellee's Brief that Plaintiff filed in the Court of Appeals, Plaintiff admitted that:

- Frank Bacha went on leave in September of 1998 and that he did not “harass” her or have direct contact with her after that date. (Appellee’s Brief, p 6.)
- Plaintiff began a vacation on November 24, 1998 and did not go to her place of employment between then and November 30, 1998 and did not have any direct contact with Mayor Pitoniak, his staff, or any other city officials on those dates. (*Id.*)
- No specific acts of harassment or discrimination occurred between November 24 and November 30, 1998. (See, *Id.*)
- On November 30, 1998, Plaintiff informed Mayor Pitoniak that she was retiring effective December 1, 1998. (Exhibit J to Plaintiff’s Court of Appeals’ Appellee’s Brief.)
- She filed this cause of action on November 30, 2001. (Plaintiff’s Appellee’s Brief, p at 11.)

Application of the clear and unambiguous language of MCL 600.5805(1) and (9) should have resulted in the conclusion that Plaintiff’s sexual and age discrimination claims are time barred because Plaintiff admitted that no act of harassment occurred after September of 1998 when Bacha went on leave and then left his employment, that no act of discrimination occurred after November 24, 1998, and that she did not file this action until November 30, 2001. The lower courts should have concluded that Plaintiff’s action was time barred because it was filed more than three years after the date of the alleged adverse employment action.

The lower courts, however, did not apply the clear and unambiguous language of MCL 600.5805(9). Instead, both Courts concluded that Plaintiff had three years from the date that she retired, December 1, 1998, which she contends was an involuntary resignation, to file

her sexual harassment and age discrimination claims. Judge Simmons did not cite any authority for his ruling. (Exhibit I, p 23.)

The majority of the Court of Appeals relied upon this Court's opinion in *Collins v Comerica Bank*, 468 Mich at 632. (Exhibit A, Per Curiam, p 2.) That majority held that in *Collins, supra*, "the Court observed that the last date worked is not necessarily the date a cause of action for discriminatory discharge accrued." (Exhibit A, Per Curiam, p 2.)

However, as Judge Zahra correctly observed in his concurring opinion in this case:

*Collins* did not involve a 'constructive discharge.' 'Constructive discharge' is a defense against the employer's argument that the employee is precluded from bringing suit because he voluntarily terminated his employment. *Jacobson, supra* at 321 n 9, citing *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994). In *Collins*, the employer fired the plaintiff. Here, plaintiff resigned. *Collins* did not interpret when plaintiff's claim 'accrued' in the context of the defense of 'constructive discharge,' and therefore is not applicable to the instant case. (Exhibit A, Zhara, J., concurring, p 1, n 1.)

In addition, the facts in *Collins* are distinguishable from the facts in this case. In *Collins, supra* at 629-630, the plaintiff was suspended on September 5, 1996, for apparently failing to cooperate with an investigation. While suspended, she was required to be available during normal working hours. *Id.* at 630. After the investigation was terminated, the defendant employer terminated Collins' employment on September 25, 1996. *Id.* Collins filed suit on September 24, 1999, alleging that the termination of her employment was the product OF race and gender discrimination. *Id.* Collins did not appear to allege that the suspension itself was discriminatory. The employer's adverse action coincided with the date the employer terminated Collins' employment. Under these facts, this Court concluded that Collins had no claim for discriminatory discharge until her employer terminated her employment and that her action, which was filed within three years of her discharge, was timely. *Id.* at 634.

In contrast, here, all of the alleged acts of harassment and discrimination occurred before Plaintiff voluntarily resigned and more than three years before Plaintiff filed her action, which asserts that those alleged acts caused her to involuntarily resign. Thus, unlike the situation in *Collins*, the adverse employment action alleged in this case did not coincide with the date of the termination of Plaintiff's employment. In addition, as explained, the employer terminated Collins' employment, but, here, Plaintiff voluntarily retired. Therefore, *Collins* is distinguishable from this case and should not have been applied to affirm the Trial Court's order denying Defendants' Motion for Summary Disposition.

The facts of this case are more analogous to the facts in *Jacobson, supra*, which involved a constructive discharge, and which the Court of Appeals also applied in this case. (Exhibit A, Per Curiam, pp 2-3; Zahra, J., concurring, p 3.)

In *Jacobson, supra* at 320, the plaintiff alleged a claim under the Whistleblowers' Protection Act, MCL 15.361. MCL 15.363(1) set forth the relevant period of limitations for filing such claims as follows:

- (1) A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both **within 90 days after the occurrence of the alleged violation of this act.** (Emphasis added.)

It appears undisputed that all the employer's alleged acts of retaliation against Plaintiff Jacobson occurred prior to October 21, 1989 and that the last act of retaliation occurred on August 16, 1989. See, *Jacobson, supra* at 321-323. Jacobson resigned on October 21, 1989 and filed suit on January 19, 1990, exactly 90 days after the day that she wrote her resignation letter. *Id.* at 323.

The issue in *Jacobson*, like the issue here, was whether the employer's alleged adverse acts started the period of limitations running or whether the date Plaintiff resigned started that period running. *Id.* at 326. The majority's opinion in *Jacobson* concluded that the date that the Plaintiff resigned started the period running, reasoning that, "[u]ntil the employee resigns, the employer's action has yet to prove to be one of discharge." *Id.* at 327.

However, with due respect to the *Jacobson* majority, their opinion failed to recognize that a constructive discharge is not a cause of action, and, instead, is the employee's defense to the employer's contention that the employee voluntarily terminated his or her employment. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994); *Wolff v Automobile Club of Michigan*, 194 Mich App 6, 15; 486 NW2d 75 (1992); See also, *Jacobson*, *supra* at 334, (Taylor, J., dissenting.). The *Jacobson* majority's opinion failed to recognize that because constructive discharge is a defense, an underlying cause of action is required to support the employee's suit. *Vagts*, *supra* at 487, See also, *Jacobson*, *supra* at 334 (Taylor, J., dissenting.)

Therefore, the pertinent question in *Jacobson* should have been, what was the period of limitations for that underlying action? See, *Jacobson*, 457 Mich at 333-335, (Taylor, J., dissenting.) MCL 15.363(1) provided the answer to that question, that is, "within 90 days after the occurrence of the alleged violation of this act." Thus, the *Jacobson* majority should have concluded that under the plain language of MCL 15.363(1), "the relevant event for purposes of the limitation period was defendant's alleged discriminatory action in August 1989." *Jacobson*, *supra* at 336, (Taylor, J., dissenting.)

The three dissenting Justices in *Jacobson* would have reached that conclusion based on Justice Taylor's analysis in his dissenting opinion. *Jacobson*, *supra* at 330-340. Justice Taylor, with Justice Weaver and then Justice Brickley concurring, opined:

The Whistleblowers' Protection Act's limitation provision, MCL 15.363(1) . . . states that a civil action must be brought 'within 90 days after the occurrence of the alleged violation of this act.' As is apparent from the quoted language, the Legislature has chosen the time of the alleged discriminatory act as the beginning of the limitation period. Because plaintiff filed suit on January 19, 1990, all incidents of alleged discriminatory retaliation that occurred before October 21, 1989, are barred.

Here, plaintiff alleges no incidents of discriminatory retaliation after August 1989, when Stone was named CEO and plaintiff was relieved of her duties. Therefore, in order to fit within the ninety-day limitation period, plaintiff was required to file a Whistleblowers' Protection Act claim by November 1989, at the latest. Because plaintiff failed to do so and did not file her claim until January 19, 1990, subsection 3(1) bars her claim.

Plaintiff attempts to avoid this result by contending that, in the context of a constructive discharge claim, the ninety-day limitation period is not triggered until the employee actually resigns. The majority adopts this position.

'[A] constructive discharge occurs only where an employer or its agent's conduct is so severe that a reasonable person in the employee's place would feel compelled to resign.' *Champion v Nation Wide Security, Inc*, 450 Mich 702, 710; 545 NW2d 596 (1996). Where an employee establishes that he was constructively discharged, he is treated the same as if the employer had actually discharged him. *Id.* **However, this does not necessarily mean that the discharge imputed to the employer occurred on the date the employee resigned.**

Constructive discharge is not in itself a cause of action, but rather is a defense against the employer's argument that the employee is precluded from bringing suit because he voluntarily terminated his employment.[n1] Because constructive discharge is merely a defense to a claim of nonsuit, an underlying cause of action is necessary to support maintenance of the employee's suit. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1984). **This Court has indicated that it is the time of the employer's alleged discriminatory act giving rise to the underlying cause of action that signals the start of the statutory limitation period, not the date the employee eventually resigns.** *Champion, supra* at 711; *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 543-544; 398 NW2d 368 (1986). Further, the United States Supreme Court has consistently held that the relevant inquiry is ' "the time of the discriminatory acts," rather than . . . 'the time at which the consequences of the acts became most painful.' *Delaware State College v Ricks*, 101 S Ct 498; 66 L Ed 2d 431 (1980); see also *Chardon v Fernandez*, 454 US 6, 8; 102 S Ct 28; 70 L Ed 2d 6 (1981).

**In other words, it is the adverse employment action leading to the employee's decision to leave that constitutes the 'discharge' giving rise to the cause of action.** *Champion, supra*, 450 Mich. at 711. Thus, here, plaintiff's discharge

occurred when Stone was named to the CEO position and plaintiff was relieved of all her duties in August 1989. Plaintiff's complaint alleged no further discriminatory acts after this point, even though her employment continued until her resignation two months later. 'Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination.' *Ricks, supra*, 449 U.S. at 257; see also *Chardon, supra* at 8; *Sumner, supra* at 530. Plaintiff's decision to resign in October was simply the "delayed, but inevitable consequence" of the board's actions in July and August 1989. *Ricks, supra* at 257-258 (holding that the plaintiff's separation from his employment was not the event that triggered the running of the period of limitation because it was merely the delayed effect of his employer's decision to deny him tenure); see also *Chardon, supra*. **Accordingly, Michigan and United States Supreme Court authority regarding constructive discharge, as well as the plain language of subsection 3(1), indicate that the relevant event for purposes of the limitation period was defendant's alleged discriminatory action in August 1989.** (Emphasis added.)

n1 *Vagts v Perry Drug Stores, Inc.*, 204 Mich App 481, 487; 516 NW2d 102 (1994); *Wolff v Automobile Club of Michigan*, 194 Mich App 6, 15; 486 NW2d 75 (1992); anno: *Circumstances which warrant finding of constructive discharge in cases under Age Discrimination in Employment Act (29 USC 621 et seq.)*, 93 ALR FED 10, 16; anno: *Circumstances in title VII employment discrimination cases (42 USC 2000e et seq.) which warrant finding of "constructive discharge" of discriminatee who resigns employment*, 55 ALR Fed 418, 420-421. *Jacobson, supra* at 330-340, (Taylor, J, dissenting.)

In the instant case, Judge Zahra issued a concurring opinion to express his agreement with Justice Taylor's dissent in *Jacobson*. (Exhibit A, Zahra, J., concurring, p 1.) Judge Zahra opined:

The statute of limitation at issue MCL 600.580[5]] states in relevant part:

(1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

\* \* \*

(9) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property. [n 2]

The statute clearly commences the limitation period from the date plaintiff's claim first "accrued," under MCL 600.5805(9).

In *Jacobson*, however, our Supreme Court held that a claim of employment discrimination, in the context of a "constructive discharge," generally accrues at the moment of resignation. *Jacobson, supra* at 321. The *Jacobson* Court expressed concern that an employee, by controlling the date of resignation, controls the date her cause of action accrues. *Id.* at 328-329 n 22. And while the majority in *Jacobson* recognized the potential for abuse when plaintiffs control the accrual of a cause of action, it concluded that the abuse would be mitigated in practice: "obviously a person claiming 'intolerable' working conditions for some number of years will be hard pressed to convince a trier of fact, or even raise a question of fact, that such conditions were unreasonably 'intolerable.'" *Id.* at 330 n 24. [n3]

However, it is legally irrelevant that "the hypothetical tardy plaintiff . . . is more likely to harm, rather than help, her cause by delaying action." *Jacobson, supra*. Statutes of limitation define the time frame in which a plaintiff can file suit, not whether a plaintiff would be hard pressed to prove the claim. "A rule that allows plaintiffs to determine when a statute of limitations begins to run, e.g. by deciding when to resign, undermines the primary purposes of statutes of limitation." *Jacobson, supra* at 339 (Taylor, J., dissenting). I agree with Justice Taylor that "it is the adverse employment action leading to the employee's decision to leave that constitutes the 'discharge' giving rise to the cause of action." *Jacobson, supra* at 335 (Taylor, J., dissenting). "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Id.* ( Taylor, J., dissenting), citing *Delaware State College v Ricks*, 449 US 250, 257; 101 S Ct 498; 66 L Ed 2d 431 (1980).

Although I agree with the dissenting opinion in *Jacobson*, I am duty bound to follow the rule of law established by the majority opinion in *Jacobson*. I therefore concur in the result reached by the majority opinion in this case.

n2 This statute has since been amended and, effective March 31, 2003, this provision is cited as MCL 600.5805(10).

n3 Simply put, *Jacobson* permits a plaintiff to postpone bringing a cause of action long after any discriminatory act occurred. Applied to the facts of this case, plaintiff effectively "controlled" the accrual of her cause of action by resigning after taking a brief vacation, during which no event occurred that supports a "constructive discharge."

But for the majority's opinion in *Jacobson*, Judge Zahra would have reached the conclusion case that Plaintiff's cause of action accrued on the date of the last act of harassment

or discrimination, which with respect to Defendant Bacha, Plaintiff admitted was before October 1998 and with respect to Defendant Pitoniak, Plaintiff admitted was before November 24, 1998. (Exhibit A, Zahra, J., concurring, pp 2-3; Exhibit D, p 61; Exhibit E, pp 77, 111, 113.)

The result that Defendants sought and that Judge Zahra would have reached is what the Michigan Legislature clearly intended in MCL 600.5805(1) and (9), (now (10)). It is also consistent with this Court's opinion in *Champion, supra* at 711, where this Court concluded that the employer's adverse act was the equivalent to a decision to discharge. It is also consistent with this Court's decision in *Sumner, supra* at 543-544, where this Court found that where no constitutional violation occurred within the limitation period, there could be no liability for "untimely discrimination," despite the fact that Plaintiff Knight involuntarily resigned within the limitations period.<sup>4</sup>

Because Plaintiff has admitted that there was no sexual harassment or discrimination by Bacha after September of 1998 or by anyone after November 24, 1998 and that she filed this action on November 30, 2001, Plaintiff's action against Bacha and Pitoniak is time-barred under MCL 600.5805(9), which is now MCL 600.5805(10).

The majority's opinion in *Jacobson* erroneously allows Plaintiff to avoid that result. Therefore, Defendants seek relief from this Court from the majority's opinion in *Jacobson* and the error that occurred in the Court of Appeals when it applied that opinion to this case. Defendants ask this Court to grant leave to appeal, or peremptory relief, to adopt and apply Justice Taylor's dissenting opinion in *Jacobson*, to this case to hold that Plaintiff's action is time barred under the undisputed facts and MCL 600.5805(9), now MCL 600.5805(10).

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<sup>4</sup> *Knight v Blue Cross/Blue Shield* was one of the three consolidated cases decided in *Sumner, supra*.

As this Court explained in *Robinson v City of Detroit*, 462 Mich at 463-464:

This Court has no obligation to perpetuate error simply because it may have reached a wrong result in one of its earlier decisions. Thus, the doctrine of stare decisis does not tie the law to past, wrongly decided cases solely in the interest of stability and continuity.

\* \* \*

Stare decisis is a ‘principle of policy’ rather than an inexorable command . . . and . . . the Court is not constrained to follow precedent when governing decisions are unworkable or badly reasoned.

The majority’s opinion in *Jacobson, supra*, resulted in that case being wrongly decided because the Court disregarded the date of accrual for a cause of action under the Whistleblowers’ Protection Act, which the Legislature enacted in MCL 15.363(1). Instead of ruling that Plaintiff Jacobson’s action had to be brought “within 90 days of alleged violation of [that] act,” the *Jacobson* majority allowed the Plaintiff to control and extend the time for filing her action well beyond that 90-day period to the date that she decided to resign. That was error, because that is not what the Legislature intended by the clear and unambiguous language of MCL 15.363(1).

The Court of Appeals’ opinion in this case perpetuates *Jacobson’s* error because the Court of Appeals applied it to a different statute of limitations, which also starts the period of limitations running from the date of the injury (adverse employer action), and, as Judge Zahra explained, applying *Jacobson* to the facts of this case allows the Plaintiff to control the accrual of her cause of action by resigning after taking a brief vacation, during which Plaintiff admitted no event occurred that supports a “constructive discharge.” This Court should use this case as the vehicle to correct its erroneous decision in *Jacobson* and to reach the correct result in this case. The correct result is to reverse the Court of Appeals’ decision and the Trial Court’s order denying Defendants’ Motion for Summary Disposition.

**II. This Court should grant leave to appeal, or peremptory relief, to conclude that the continuing violations theory did not toll the period of limitations.**

In *Sumner v Goodyear*, 427 Mich at 510, this Court adopted “the continued violation approach, concluding that an alleged timely actionable event will allow consideration of and damages for connected conduct that would be otherwise barred.” In doing so, the *Sumner* Court recognized that, as a threshold for finding liability for untimely discriminatory acts, the plaintiff must establish the existence of a timely or present violation. *Id.* at 527-528, 543-544. It is insufficient to merely establish present effects of past discrimination. *Sumner, supra* at 527-528, 543-544. *Sumner* explained that, “[t]he mere existence of continuing harassment is insufficient if none of the relevant conduct occurred within the limitation period. *Id.* at 539.

In *Rasheed v Chrysler Motors Corp*, 196 Mich App 196, 207; 493 NW2d 104 (1992), rev’d on other grds 445 Mich 109 (1994), our Court of Appeals explained that the continuing violations theory “allows a plaintiff to seek damages for violations that occurred outside the limitation period if the violations are ‘continuing’ in nature and at least one of the discriminatory acts falls within the statutory limitation period.”

In this case, by Plaintiff’s own admission, none of the alleged harassment or discriminatory acts occurred within the three-year period of limitation. Plaintiff admitted filing her complaint on November 30, 2001. However, Plaintiff also admitted that there were no acts of harassment or discrimination by Bacha after he went on leave in September of 1998 and no specific acts of discrimination by anyone after November 24, 1998. (Exhibit D, p 61, Exhibit E, p 77, 111, 113; Plaintiff’s Court of Appeals’ Appellee’s Brief, p 6.) Plaintiff’s sworn deposition testimony on these points is as follows:

Q. Was there any type of harassment by Mr. Bacha that you are aware of after he went on leave in September of 1998?

A. No. I never saw him again. (Exhibit D, p 61.)

\* \* \*

Q. And by the same token, then, after September of 1998, Frank Bacha did not personally engage in any type of sexual or age discrimination against you?

A. No. . . . (Exhibit E, p 77.)

\* \* \*

Q. So you never returned to work after, to the best of your knowledge, November 24, 1998?

A. That's correct. I did not return to work.

Q. So certainly there wasn't any discrimination against you by Mr. Bacha or the Mayor or anyone else at the City after November 24<sup>th</sup> 'till November 30; is that correct?

A. No. I mean I was on vacation. (*Id.* at 111.)

\* \* \*

Q. There was no specific incident of discrimination from November 24<sup>th</sup> to November 30<sup>th</sup>; is that correct?

A. . . .There was no specific act of discrimination during that time period. (*Id.* at 113.)

Thus, Plaintiff admitted facts which preclude application of the "continuing violations" theory. *Sumner, supra* at 539; *Rasheed, supra* at 207.

In the Court of Appeals, Plaintiff attempted to get around her sworn deposition testimony by arguing that "the disparate treatment in wages<sup>5</sup> and as to severance pay continued unabated

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<sup>5</sup> Plaintiff's "disparate wages" argument is based on her claim that Randy Wittner's director's salary was higher than hers by the amount that she used to be paid regularly for overtime, which she no longer worked or received after Wittner was hired. Plaintiff acknowledged that Wittner was not entitled to any additional pay above his salary for overtime. (Plaintiff's Court of Appeals' Appellee's Brief, p 14.)

into December of 1998. Thus, Plaintiff claimed that she suffered effects of harassment and discrimination after November 24, 1998, that is, reduced pay from not having overtime work available as a result of Wittner being hired and not receiving severance pay as a result of not being fired.

However, in *Sumner, supra* at 528, this Court held that a claim that a continuing violation existed where a party suffered untimely effects or injury from a past untimely act of discrimination 'ceased to be actionable' after the U.S. Supreme Court's opinion in *United Air Lines, Inc v Evans*, 431 US 553 (1997). As *Sumner, supra* at 527 explained, in *Evans*, the plaintiff contended that the denial of seniority to her in 1972 was the most recent part of a continuing violation initiated in 1968 when the defendants' discriminatory policies required her to resign when she married. *Sumner, supra*, further explained that *Evans* held:

That plaintiff merely alleged the perpetuation of effects of prior discrimination. **What is necessary, the Court stated, is a 'present violation', i.e., a discriminatory act within the limitation period.** The refusal to grant seniority did not constitute such a violation, because it was based on a 'neutral' rule, i.e., one that would be applied to all parties equally. (Emphasis added.)

*Sumner* held, *supra* at 530, that *Evans* stated, "that where an action is not in and of itself discriminatory, i.e., it has a discriminatory effect only because of a prior discriminatory act, it cannot sustain a cause of action."

In this case, Plaintiff contends that her salary was reduced by the amount of overtime that she no longer was required to work after Wittner was hired. She also claims that she was denied severance pay because the City did not terminate her at-will employment. Plaintiff did not cite any authority that establishes that such acts were discriminatory acts. Nor did she present any evidence that she was treated differently from other employees under similar circumstances, that

is, Plaintiff did not establish that other employees were paid overtime pay when not working overtime or were paid severance pay when they voluntarily resigned.

Furthermore, the “injuries” that Plaintiff allegedly sustained after November 24, 1998 allegedly resulted from the prior alleged discriminatory acts of Wittner being hired and taking over her duties by October 19, 1998. Thus, like Plaintiff Evans, Plaintiff Joliet is merely alleging “the perpetration of effects of alleged prior discrimination,” which is not actionable. See, *Sumner, supra* at 527, 530.

Accordingly, Plaintiff failed to establish a continuing violation to avoid the statute of limitations bar.

In addition, in *Rasheed, supra* at 208, the Court of Appeals held that for the “continuing violations” theory to apply, plaintiffs must show that they became aware of the victimization only when the last act occurred. *Rasheed, supra*, citing *Bell v Chesapeake, & Ohio RR Co*, 929 F2d 220, 223-224 (6<sup>th</sup> Cir 1991), held that if any discriminatory act should have made a plaintiff aware that she was a victim and that act falls outside of the period of limitations, the plaintiff is without a remedy because of her failure to pursue her rights when she first became aware of her injury.

In *Rasheed, supra*, the Court of Appeals held that evidence that plaintiff had made reports in the past of discriminatory acts and treatment to supervisory personnel was proof that he was aware of injuries caused by acts of discrimination and that his failure to pursue those claims within the statutory period precluded him from seeking damages for those actions. In *Rasheed, supra*, the Court of Appeals held that the trial court properly denied plaintiff the right to seek damages for those allegedly discriminatory acts that occurred outside the three-year period of limitation.

In this case, the evidence is undisputed that Plaintiff was well aware that she was an alleged victim of age and sex discrimination at least as early as September 3, 1998, when she made a written complaint regarding the alleged harassment to the City Director of Personnel, John Delo, and the City Chief of Staff, Jim Riddle. (Ex. F.) In fact, she began keeping notes of alleged harassment and discrimination as early as August of 1997. (Ex. D, pp 32, 33, 36-39, 41, 43; Ex. E, p 118.) In addition, Plaintiff met with attorneys from Howard & Howard in the latter part of September 1998 regarding her discrimination claims. (Ex. B, pp 64, 72.) These written complaints establish that Plaintiff knew that she was an alleged “victim” more than three years prior to filing this action on November 30, 2001. Therefore, Plaintiff is now without a remedy because she failed to pursue and protect her rights when she first became aware of her injury.

*Rasheed, supra.*

The lower courts erred by failing to conclude that Plaintiffs’ claims for damages for alleged harassment and discriminatory acts that occurred outside the three-year period of limitations are barred. *Sumner, supra; Rasheed, supra* at 208. Therefore, this Court should grant leave, or peremptory relief to correct the lower courts’ errors.

**III. Plaintiff’s alleged breach of contract claim under Count IV of her Complaint does not extend the statute of limitations since Plaintiff seeks damages for injury to “person or property.”**

Plaintiff seeks to avoid the three-year statute of limitations by alleging a “breach of contract” claim in Count IV of her Complaint. However, regardless of the label that Plaintiff has chosen to place on her claim, under any theory, Plaintiff is seeking recovery for injuries to her person, and the three-year statute of limitations set forth in MCL 600.5805(9), (now (10)), applies.

In *Glowacki v Motor Wheel Corp*, 67 Mich App 448, 460; 241 NW2d 240 (1976), the Michigan Court of Appeals held that where a plaintiff seeks damages for interference with earning capacity as a result of wrongful discharge from employment, the injury is one to her “person or property” under the three-year statute of limitations. Relying upon the holding in *Stringer v Sparrow Hospital*, 62 Mich App 696; 233 NW2d 698 (1975), the Court of Appeals in *Glowacki* stated:

In *Stringer*, this Court focused upon the interest allegedly harmed and held that a suit based upon wrongful interference with earning capacity presented a claim for ‘injuries to persons and property under MCL 600.5805(7) [subsequently, MCL 600.5805(9) and now MCL 600.5805(10)]. Plaintiff here claims injury to the same interest brought about by wrongful discharge from employment.

\* \* \*

**While plaintiff’s claim against the employer may be phrased as one for damages suffered by wrongful termination of a contract at will, and thus governed by (the breach of contract statute of limitations), to do so would disregard the substance of her claim. *Stringer* indicates that plaintiff is seeking ‘injuries to person’ and the three year period should apply despite the possibility of attaching a contract label to the claim. (Emphasis added.) *Glowacki*, 67 Mich App at 460.**


Here, as in *Glowacki*, merely because Plaintiff Joliet has attempted to label her claim as one for “breach of contract” does not change the fact that her claim is one for discrimination and loss of earning capacity; and, thus, is actually a claim for “injury to person,” requiring that the three-year statute of limitations apply.

Accordingly, Plaintiff’s “breach of contract” claim, like her other claims, is time barred and should have been summarily dismissed. Therefore, this Court should grant leave to appeal or peremptory relief to correct the lower courts’ errors in denying Defendants’ Motion for Summary Disposition.

## RELIEF SOUGHT

Defendants-Appellants Gregory Pitoniak and Frank Bacha respectfully request that this Honorable Court grant leave to appeal, or peremptory relief, to adopt Justice Taylor's dissenting opinion in *Jacobson, supra*, to conclude that Plaintiff-Appellee Virginia Joliet's entire action is time barred, and to reverse the order denying Defendants' Motion for Summary Disposition.

SECRET WARDLE

BY:   
JANET CALLAHAN BARNES (P 29887)  
Attorney for Defendants-Appellants  
30903 Northwestern Highway  
P.O. Box 3040  
Farmington Hills, MI 48333-3040  
(248) 851-9500

Dated: October 6, 2004

SECRET WARDLE